

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL
75-1023

13
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United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

against

ERNESTO LOPEZ,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK.

APPENDIX.

PETER M. J. REILLY, Jr.,

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Attorney for Appellee,

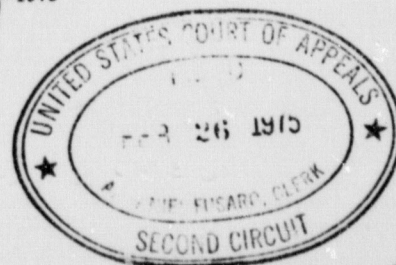
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UNITED STATES COURT OF APPEALS,
FOR THE SECOND CIRCUIT.

-----X

UNITED STATES OF AMERICA,

Appellee,

against

ERNESTO LOPEZ,

Defendant-Appellant.

On Appeal From the United States District Court
for the Eastern District of New York.

-----X

DOCKET ENTRIES.

9-4-74	Before NEAMER, J. - Indictment filed	
9-4-74	Before Platt, J. - case called - deft & counsel Peter M. Reilly present - Deft arraigned and enters a plea of not guilty after being advised of his rights and on his own behalf - bail commd - adjd to 9-9-74 at 2:00 PM to set trial date.	
9-9-74	Notice of readiness for trial filed	to set a
9-12-74	Before Platt, J. - case called - adjd to 9-12-74 (trial date)	
9-12-74	Before PLATT, J. - Case called - Several motions argued - decision reserved	
9-12-74	Before PLATT, J. - Case called - Deft and counsel present - Deft arraigned - enters a plea of not guilty to new indictment - bail reduced to \$75,000 - secured by property - case set for trial on 10-7-74	

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DOCKET ENTRIES

10-24-74 By PLATT, J - Order filed on 6 motions of deft-granted and denied as indicated (see Order) Order dated Sept 27, 1974 but received and filed in Clerks Office on 10-2-74.

10/3/74 Before PLATT, J.- Case called- Adjd to 10/8/74 at 9:30 A.M. for trial

10/4/74 Before PLATT, J.- Case called- Motion for bill of particulars, discovery argued- granted and denied as indicated- Set down for trial on 10/15/74

10/8/74 Govt's bill of particulars filed

10/15/74 Before PLATT, J.- Case called- Deft and counsel present- Trial ordered as begun- Jurors selected and sworn- Deft's motion for a mistrial denied- contd to 10/16/74- Motion to change a witness's residence to a hotel- no opposition- motion granted

10/16-74 Before PLATT, J - case called - Trial resumed - Trial contd to Oct. 17, 1974.

10/17/74 Before PLATT, J.- Case called- Deft and counsel present- Trial resumed Trial contd to 10/18/74

10/18/74 Before PLATT, J.- Case called- Deft and counsel present- Trial resumed- Trial contd to 10/21/74

10/21/74 Before PLATT, J.- Case called- Deft and counsel present- Trial resumed- Trial contd to 10/22/74

10/22-74 Before PLATT, J - case called - trial resumed - Trial contd to Oct. 23, 1974.

10/23/74 Before PLATT, J.- Case called- Deft and counsel present- Trial resumed- Deft's motion to dismiss counts 1-22 incl.- motion denied- Deft after being advised of his rights by the court and on his own behalf enters a plea of guilty to superseding information 74 CR 662- Bail contd- Jury discharged- Trial concluded

10/23/74 Stenographers Transcripts dated 10/16/74, 10/17/74, 10/18/74, 10/21/74, 10/22/74(2) filed

1/8/75 Stenographers Transcript dated 10/23/74 filed

1/13/75 Before PLATT, J.- Case called- Deft and counsel present- On motion of Corcoran the indictment is dismissed

1/14/75 By PLATT, J.- Order of dismissal filed

1/15/75 Notice of appeal filed

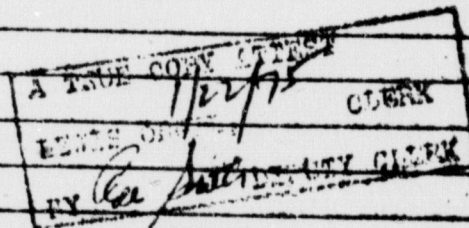
1/16/75 Docket entries and duplicate of notice of appeal mailed to court of

DOCKET ENTRIES

1-15-73 Motion to dismiss counts 1 and 2; motion to adjourn case, motion to
 counts 1 and 2 etc and for severance, etc. motion for Discovery, Motion
 Bill of Particulars,; motion to discover the Grand Jury Minutes (all
 filed this date received from Chambers)

1-15-75 Letter dated 9-16-74 filed received from Chambers
 from Peter M. J. Reilly, Esq. re deft.

1-15-75 Govts Memorandum of Law in opposition to defts pre-trial motions
 (received from Chambers)



INFORMATION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA,

-against-

ERNESTO LOPEZ,

Defendant.

-----x

THE UNITED STATES ATTORNEY CHARGES:

COUNT ONE

From and between January 1, 1970, to and including July 23, 1974, within the Eastern District of New York, the defendant Ernesto Lopez, together with another person or persons not named herein, did unlawfully, knowingly and wilfully combine, conspire and confederate and agree to commit certain offenses against the United States, to wit, to violate Title 8, United States Code, § 1324(a) (3) by wilfully and knowingly harboring aliens at 95 Heather Lane, Westbury, Long Island, New York, and at various other houses within the Eastern District of New York.

OVERT ACTS

In furtherance of said conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the Eastern District of New York:

1. On or about the 23rd day of July, 1974, the defendant ERNESTO LOPEZ, did wilfully and knowingly harbor at 95 Heather Lane, Westbury, New York, ISABEL MARTINEZ-RAMONO, an alien not duly admitted into the United States by an Immigration Officer not lawfully entitled to enter and reside within the United States, as ERNESTO LOPEZ then knew.

2. On or about the 1st day of July, 1974, within the Eastern District of New York, the defendant ERNESTO

INFORMATION

Cr. No.

(T. 18, U.S.C., Section
371 and Section 3)

INFORMATION

LOPEZ, did wilfully and knowingly harbor at 77 Old Farm Road, Lavittown, New York, SAUL ANTONIO FLORES-REYES, an alien not duly admitted into the United States by an Immigration Officer not lawfully entitled to enter and reside within the United States, as ERNESTO LOPEZ then knew.

* * * * *

EXCERPTS FROM TRANSCRIPT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA, :

-against- : 74-CR-527

ERNESTO LOPEZ, :

Defendant. :

-----X

United States Courthouse
Brooklyn, New York

10:00 o'clock A.M.
October 23, 1974

B e f o r e :

HONORABLE THOMAS C. PLATT, U.S.D.J.

HENRY SHAPIRO
OFFICIAL COURT REPORTER

EXCERPTS FROM TRANSCRIPT

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Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: PAUL CORCORAN, ESQ.
Assistant U.S. Attorney

PETER REILLY, JR., ESQ.
Attorney for the Defendant

Also present:

ALBERT BOYNE
Spanish Interpreter

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EXCERPTS FROM TRANSCRIPT
MOTIONS TO DISMISS

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1 from which the jury can infer that Mr. Lopez willfully
2 and knowingly harbored these witnesses.

3 THE COURT: As indicated during the course of
4 the trial, I would deny your motion, Mr. Reilly, with-
5 out prejudice to renew at the conclusion of the entire
6 case and before submitted to the jury.

7 MR. REILLY: For the purpose of saving time--

8 THE COURT: No.

9 MR. REILLY: Well --

10 THE COURT: You may renew your motion at the
11 end of the entire case and I will at that point con-
12 sider it.

13 I think at this point, I would deny it.

14 I would consider it again at the conclusion of
15 the entire case before my charge to the jury.

16 MR. REILLY: Now, with respect to each and every
17 one of the 22 counts in the indictment.

18 I would move to dismiss each and every count
19 on the following basis:

20 That the statute involved, 1324, as I indicated
21 in my preliminary motions which were submitted to the
22 Court, that by any fair reading of it -- which has
23 application even in the subsections -- as to the
24 situation of harboring, it is connected in the course
25 of conduct with smuggling --

EXCERPTS FROM TRANSCRIPT

1 THE COURT: I have already decided that.

2 MR. REILLY: I appreciate it. I renew it at
3 this time.

4 THE COURT: I adhere to the same ruling.

5 MR. REILLY: May I further state that there is
6 absolutely no proof in the record of this case that
7 Mr. Lopez had anything to do with the entry of any of
8 these people into this country and in fact as to
9 several counts I think the record will indicate that
10 some of them were here for periods of months before the
11 even came to his houses.

12 Now, with respect to harboring, I move to dis-
13 miss each and every count of this indictment on the
14 following basis:

15 That the term harboring as construed by most
16 of the cases -- many of which I have submitted to
17 this Court -- construed it to mean a secretive hiding
18 or clandestine hiding.

19 The word "harbor" is subject to many meanings.
20 It can mean a port where ships dock and I am sure that
21 doesn't apply here --

22 THE COURT: I do not think that is the meaning
23 when used as a verb.

24 MR. REILLY: Yes, it can mean giving somebody
25 shelter, there are no two ways about that. But it also

EXCERPTS FROM TRANSCRIPT

1 has been defined in Black's Law Dictionary as a
2 "clandestine sheltering" and has been defined in many
3 cases as a secretive thing.

4 When one considers the fact that this is a
5 criminal statute -- that the majority of cases have
6 defined it that way for the purpose of a criminal
7 statute -- there being absolutely no proof in this
8 case as to any count that Mr. Lopez in any way hid or
9 secreted these people -- they went about living normal
10 lives like anybody else -- there is no evidence that
11 he was hiding them.

12 They may on occasion of their own have hidden
13 themselves, but there is nothing in the case whatever
14 to indicate in any way that he participated in any way
15 in harboring.

16 I think the Court must strictly construe this
17 and construe this in the most favorable definition to
18 the defendant, since the term "harboring" is susceptible
19 to a number of definitions.

20 I think this is especially true in light of the
21 fact that the majority of the cases have held this to
22 be the law and that if the theory that a person is
23 supposed to be aware of the law holds true, then I --
24 which I think is a fiction of the law -- if that theory
25 is so, then I think Mr. Lopez has a perfect right to

EXCERPTS FROM TRANSCRIPT

1 interpret the statute that way, since it is perfectly
2 susceptible and naturally susceptible to that inter-
3 pretation and many Courts have held that to be the
4 interpretation to be applied to it.

5 Therefore, there being no proof that he ever
6 did anything in a clandestine way with respect to any
7 of these counts of the indictment, nor did he secretly
8 hide any of these people, I would move to dismiss each
9 and every count in that regard.

10 (Continued next page.)

Notes

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EXCERPTS FROM TRANSCRIPT

1 THE COURT: Well, based on what I read on the
2 subject, Mr. Reilly, I feel that the definition given
3 in the Herrera case is the proper definition to
4 apply to the statute and I heretofore indicated to
5 you in my prior opinion and prior discussions on the
6 question.

7 At this stage I am going to deny your motion
8 on that authority.

9 MR. REILLY: I'd further move to dismiss this
10 entire indictment and every count of it on the basis
11 that this statute -- especially the sub-section that
12 is directly applicable to this case as vague on its
13 face and unconstitutional; that it doesn't fairly
14 apprise any individual of what the law is with
15 respect to what he can or cannot do and I think clearly
16 that it would have been a simple matter of the Congress
17 intended the type of conduct of Mr. Lopez to be criminal
18 in nature that it should have clearly put in the word
19 -- the simple word "renting" into the statute and I
20 don't think it fairly apprises anybody that the conduct
21 is forbidden conduct. And I feel that it is vague
22 and unconstitutional as a result on its face, and I
23 would move to dismiss all the counts on that basis.

24 MR. CORCORAN: Your Honor, the Government's
25 position is as has been stated during our prior

EXCERPTS FROM TRANSCRIPT
discussions.

THE COURT: I understand. I am going to deny your motion on that ground, too, but I think it is not just a question of renting in this case.

The proof is far broader than that and under the circumstances, I think the proof measures up to the language of the statute.

MR. REILLY: Now, as part of this motion, I would further move to strike any of the testimony with reference to job applications of people who were not here, were not connected to the indictment on this basis, that the nature of this proof was offered to show a common scheme or plan.

I don't believe it was validly offered with a proper foundation for those questions.

Now, the reason this proof was offered ultimately towards this common scheme or plan was to show that the defendant knew that these people who are named in the indictment were illegally admitted into this country. That was the ultimate reason for the submission of that proof and the primary reason.

I don't believe that permitting this proof in any way shows that fact. The only thing this proof shows is that taken at its best arguendo, is that Mr. Lopez submitted applications of individuals who

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2
3 were in fact aliens.

4 Now, there is not a scintilla of proof in any
5 of this evidence that he knew that they were aliens --
6 illegal aliens. I thin by this nature that this proof
7 is an exception to the general rule.

8 The requirement on the part of the Government
9 is to reasonably prove and I think prove fairly,
10 conclusively, that he knew that they were illegal
11 aliens. I think the testimony in this case has in-
12 dicated that there were any number of statuses that
13 an alien can have in this country, and I know of no
14 obligation that a citizen of this country is put under
15 to inquire of another person here as to hwere they
16 come from or what their status is.

17 Though it is proof of illegal alienage that he
18 filled out job applications, it does not prove that
19 he knew that and that was the basic purpose for which
20 that proof was offered.

21 I don't think, no matter how high you pile
22 bad proof, it is made good.

23 I would therefore move to strike all of that
24 testimony.

25 THE COURT: As I explained to you during the
course of the trial on that question, it is going to
be received. I have tried to detail it all in connection

EXCERPTS FROM TRANSCRIPT

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1 4 with my charge. Hopefully the Jury will understand
2 that it is to be limited solely for the limited pur-
3 pose of showing knowledge as to the counts -- the
4 good counts in the indictment -- and it will be ad-
5 mited under the similar acts rule, which I showed to
6 you yesterday -- the substance of the charge.

7 Now, as far as the question as to the knowledge
8 of the illegal acts and this particular proof is
9 concerned, this is an inference which the Jury may or
10 may not draw. They may not draw the inference from
11 the facts. This is a question that will be left up
12 to them.

13 It is very hard, as all of the charges that
14 I have read -- very hard to prove knowledge on the
15 part of anybody except by circumstantial evidence
16 or an admission. If you don't have an admission,
17 all you can do is use circumstantial evidence and
18 ask the Jury to draw an inference from the facts. That's
19 what the prosecution is asking the Jury to do here.

20 MR. REILLY: I think the prosecution is asking
21 to draw more than an inference. They are asking to
22 draw by quantum alone inference upon inference.

23 THE COURT: Well, similar acts --

24 MR. REILLY: A similar act in and of itself --
25 when proof is lacking on the direct issue -- is

EXCERPTS FROM TRANSCRIPT

5 certainly not a valid inference to draw nor to permit
a Jury to draw.

When the overwhelming amount of this documenta-
tion is such, in my opinion, that it severely preju-
dices the defendant, it is grossly unfair.

THE COURT: You may be right, but at this point
I disagree. I deny that motion.

MR. REILLY: With respect to this question
of knowledge, I further move to dismiss each and every
count on the basis that Mr. Lopez is under no duty
to inquire as to the status of any individual, that
this is the Government's responsibility. It is not
the job or duty and in fact they didn't fulfill it.

There is virtually no proof that any of these
people ever told him about their status, nor do I
see any obligation on his part to inquire about it.

THE COURT: Certainly with respect to Counts
21, 22 and Count 3, there was proof of actual knowledge.

MR. REILLY: Which counts are that?

THE COURT: Gladys Lopez, Antonio Flores.
There is proof of actual knowledge.

As to the balance, that is a question of infer-
ence.

MR. REILLY; I would further move to dismiss
and I would have some difficulty specifying which

EXCERPTS FROM TRANSCRIPT

1 counts except the three that your Honor has named.
2 The remaining counts and all of the counts of the
3 indictment with respect to the proof submitted as to
4 knowledge at all, it is my position that as to
5 each and every one of these counts, there has been
6 absolutely no proof submitted to this Court or Jury
7 that Mr. Lopez knew that these people were aliens
8 and in fact as to many of these individuals,
9 Mr. Corcoran didn't even question them in that area
10 or ask them if they had ever told him or if there
11 was knowledge.

12 I think when you consider the fact that each of
13 these is a separate count, there is an obligation
14 to prove prima facie as to each individual that there
15 is knowledge on the part of Mr. Lopez, that each of
16 these individuals was -- he was in fact aware was
17 an illegal alien.

18 I think, depending on the individual case,
19 that was -- there was one woman I think, Cesaria --
20 she was only here three, four or five days. To place
21 a burden on a person who lives in your house for three,
22 four or five days is illegally in the country -- for
23 him to be required to know a fact like that is cer-
24 tainly beyond any sense of fairness of constitutional
25 question that I could find.

EXCERPTS FROM TRANSCRIPT

1 I don't believe there was any testimony that
2 he knew or had any knowledge of the fact that she
3 was illegally in the country, especially considering
4 the very brief time she was in the house. He only
5 met the woman once.

6 THE COURT: That's count 12.

7 MR. REILLY: I believe that is the count I
8 am referring to as to those particular facts.

9 THE COURT: That count is probably the only
10 one that would fail in that category as I see it where
11 -- my notes show where she came in as a tourist
12 with a 15-day visa on August 23, 1973, and spent eleven
13 months in Los Angeles, and then came to New York and
14 went to No. 35 in Levittown and four days later the
15 Immigration people came. Two days after arrive, they
16 talked to Lopez. "I begged him to let me stay until
17 I could go to another place."

18 MR. REILLY: That's the only thing related --

19 MR. CORCORAN: May I respond?

20 THE COURT: Yes.

21 MR. CORCORAN: A prima facie case merely requires
22 sufficient evidence from which a Jury can draw an
23 inference.

24 We are dealing with a state of mind which has
25 to be established by circumstantial evidence. The

EXCERPTS FROM TRANSCRIPT

1 circumstances here are such that I believe that the
2 Jury can validly draw the inference that Mr. Lopez
3 knew that he was harboring these people --

4 THE COURT: I am talking about the one parti-
5 cular count.

6 MR. REILLY: Mr. Lopez allowed her to remain
7 in his house. Fortuitously, Immigration agents
8 raided the house two or three days after the conver-
9 sation. It doesn't change his knowledge or the
10 presence of her being in his house or having the Jury
11 draw the inference that he knew she was illegal and
12 he gave her shelter knowing that she was illegal.

13 THE COURT: I am inclined to let it go to the
14 Jury and let them determine whether or not in the light
15 of your argument whether he was just closing his eyes.

16 MR. REILLY: Is the Court ruling the conscious
17 disregard has application?

18 THE COURT: On the issue of knowledge, my re-
19 collection is of the rule is you can't deliberately
20 close your eyes to what are apparent facts.

21 (Continued on next page.)
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EXCERPTS FROM TRANSCRIPT

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1 MR. REILLY: What are the apparent facts? A
2 woman, a Hispanic woman comes to your house and says
3 "Can I rent a room," and stays for four days?

4 THE COURT: Along with all these other people
5 who do the exact same thing. I think he was well on
6 notice that he was -- at the very least, he was im-
7 posed upon by a large number of illegal aliens, and I
8 don't think he can close his eyes to that fact.

9 MR. REILLY: I don't think the proof is that.

10 THE COURT: That is where we part company.

11 MR. REILLY: I'd like to refer specifically to
12 Count 20.

13 THE COURT: Of course it is for the jury to
14 decide. For the purposes of this ruling we part
15 company. You understand. This is a factual issue.

16 MR. REILLY: I appreciate that.

17 For the purposes of this argument, I'd like to
18 refer next to Count 2. I believe the woman's last name
19 was Silva, the mother of Gladys Lopez.

20 THE COURT: Yes.

21 MR. REILLY: As to that count specifically I
22 move to dismiss because -- for a number of reasons.
23 Number 1, I think the evidence -- I'm sure the Court
24 recalls the evidence as to her, that Immigration came
25 to the house and -- in '72 and because of her health

2 EXCERPTS FROM TRANSCRIPT

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1 and other circumstances, and after consulting with her
2 physician, apparently, in fact permitted the woman to
3 stay.

4 Whether Mr. Lopez was aware of that fact or not,
5 I don't know, and I don't know that there is any proof
6 in the record as to that.

7 In fact, whether she had -- whether she was
8 given a categorized status in the country as a result
9 of her illness, I don't know.

10 But in fact, the Government did apparently
11 permit her to stay.

12 I don't know that -- assuming arguendo, that
13 all the proof that's submitted with respect to know-
14 ledge, assuming it is all valid, what position is a
15 citizen placed in when the enforcement agency in fact
16 permits her to stay and to remain in the country them-
17 selves, knowing full well where she is and the circum-
18 stances under which she is staying in the country? Is
19 it then the burden of a citizen, after Immigration has
20 de facto permitted her to stay, to go in and protest
21 that decision?

22 It is they who in fact let this woman stay and
23 now for them, who are in an affirmative way permitting
24 her to stay, with full knowledge of where she is, they
25 now turn around and charge Mr. Lopez with harboring,

EXCERPTS FROM TRANSCRIPT
and I think the Government's conduct in fact in this requires the Court to dismiss this Count and puts him in the position of not knowing in fact what her status is.

MR. CORCORAN: May I be heard?

THE COURT: My recollection may be wrong, and again it will be a question of fact for the jury, but my recollection is that she told Mr. Lopez that she was there illegally and asked him to get her a job, which he did. That being the fact, granted subsequently she got sick for a time and the Immigration Service did not remove her when she was sick, it seems to me that there is an affirmative obligation on the part at that point of Mr. Lopez to take some steps with respect to this person who he knew is an illegal alien, because she had -- I am taking the proof as offered by the Government -- stop giving her a place to live after she got well.

MR. REILLY: This would be true, Judge, if the indictment charged that he harbored her in 1972. In fact, the indictment charges the 23rd day of July, 1974 he harbored her.

THE COURT: She was not too sick at that point.

MR. REILLY: She indicated that she is still under treatment.

EXCERPTS FROM TRANSCRIPT

1 THE COURT: Still under treatment. Still being
2 too sick to go back home are two different things.

3 MR. REILLY: But in fact, it was Immigration
4 themselves who permitted her to stay.

5 THE COURT: I do not think there was any affirm-
6 ative proof of that kind. They just did not arrest
7 her on that date. Those are two different things.

8 She did not get any kind of a visa or go to any
9 -- go apply for any kind of hearing from Immigration to
10 get permission, formal permission to stay because of her
11 illness.

12 She was an illegal alien and by her testimony,
13 which is all we have in the record right now, Mr.
14 Lopez knew she was an illegal alien and he was giving
15 her a place to live.

16 MR. REILLY: But subsequent to that knowledge,
17 they permitted -- it was they who permitted her to stay.

18 THE COURT: That is an investigator who did not
19 make an arrest, but you cannot bind the Government
20 with that as a determination made by the Government
21 that she be permitted to stay, the failure to make an
22 arrest.

23 MR. REILLY: I'd make basically --

24 THE COURT: Two different things.

25 MR. REILLY: Where then, if the Government in

EXCERPTS FROM TRANSCRIPT

1 fact is the one who permits her to stay, can one impute
2 knowledge to Mr. Lopez that there is some illegality
3 in her staying, if it's the Government themselves who
4 permitted her to stay?

5 THE COURT: No. Wait a minute. They are two
6 different things, as I see it. One, you are talking
7 about a person who does not make an arrest of somebody
8 who is bed-ridden in 1972 and did not haul her off to
9 the Immigration jail at that time.

10 Albeit, everybody knew she was an illegal alien,
11 and construing that to mean that they had granted her
12 an indefinite extension of time to remain in this
13 country. I do not equate the two. You are trying to
14 equate the two but I do not.

15 MR. REILLY: Well, I'd further submit to the
16 Court on this question that because the Immigration
17 Department or whoever enacted these rules and regula-
18 tions has certain formal classifications with respect
19 to the status of aliens --

20 THE COURT: This did not go through.

21 MR. REILLY: De facto, there was a status
22 apparently given to this woman where she was permitted
23 in fact to stay.

24 THE COURT: Oh, no. The failure to arrest does
25 not give rise to that kind of a status. The failure to

EXCERPTS FROM TRANSCRIPT

1 arrest at a given time by a -- even though a policeman
2 saw a person leaving the scene of a crime does not give
3 him immunity from being arrested at a subsequent date,
4 when the officer verifies the fact that he did commit
5 the crime.

6 Just because you are a policeman, you see me
7 running out of a bank and you wonder and your failure
8 to arrest me at that point does not give me immunity
9 from then on.

10 MR. REILLY: Of course not. I am not contending
11 that.

12 What I am saying is that the -- in this case
13 we are talking in terms of Mr. Lopez.

14 THE COURT: Let's assume that you know I robbed
15 a bank and then I'm at home and I've got a very, very
16 serious illness and I've got a very high fever and you
17 say to my doctor "All right, I won't pick him up and
18 take him down to jail today." That does not give me
19 immunity from that point on.

20 MR. REILLY: Then I certainly have not contended
21 that and I don't think the analogy fits the facts here
22 at all.

23 The significant thing to me, and I think it
24 concerns all the counts of this indictment, is that we
25 are dealing in a question of Mr. Lopez's knowledge and

EXCERPTS FROM TRANSCRIPT

1 I think there is quite a bit of evidence in this case
2 that each and every one of -- there are any number of
3 alien statuses where a person can infact be living
4 here.

5 THE COURT: All this --

6 MR. REILLY: I think this is terribly significant.

7 THE COURT: It cuts two ways, Mr. Reilly. The
8 fact that the -- let's assume that Mr. Lopez was on
9 the premises on the day this raid was made. That is
10 not my recollection of the testimony. Let's assume
11 he was. Let's assume he knew, they went in and they
12 saw Mrs. Silva in bed with -- sick, and assume the
13 doctor was there and they all had a conversation and
14 they said "We will leave her there until she is well
15 enough to get up on her feet." To me that carries a
16 -- the sword is double, so to speak, because he at that
17 point knows that as soon as she is back on her feet,
18 he's got to turn her out. She is an illegal alien.

19 MR. REILLY: I do not think there is any proof
20 that she ever got back on her feet and in fact there
21 is --

22 THE COURT: She was on her feet here.

23 MR. REILLY: She is on her feet in the technical
24 sense but there is still evidence in the case that she
25 is still seeking medical attention because she has

EXCERPTS FROM TRANSCRIPT
cancer.

THE COURT: The next time she will see a doctor
is two months.

MR. CORCORAN: She also testified she returned
to work.

THE COURT: I do not see that that transforms
that case into a different case.

MR. REILLY: I think it's significant in the
question of Mr. Lopez's knowledge. That's the real
significance.

THE COURT: I think it cuts both ways on the
question of knowledge. Her case can be viewed in
either of two ways and I think in -- the heavier weight
of the evidence is against Mr. Lopez. One, she told him
and, two, he knew after the Immigration Service had
been there that as soon as she was able to get up and
about he ought to get her out of there.

(Continued next page.)

Notes

EXCERPTS FROM TRANSCRIPT

1 MR. REILLY: I'll except to the Court's
2 ruling. I further move to dismiss the entire
3 indictment on the grounds that this statute when
4 taken as a whole creates a preferred class without
5 valid distinction, in that it excepts employers as
6 opposed to anyone else without a rational distinction.

7 I think it is particularly applicable in the
8 situation of what we have here, basically a landlord,
9 that is not a rational distinction and I think to
10 make such a distinction is patently unconstitutional.
11 There is no purpose in the distinction and for many,
12 many purposes in a situation where an illegal alien
13 is in the country, he would have the situation of
14 an employer, for instance, on a farm, in addition
15 to employing the individual, putting him up and
16 boarding him for the night, giving him room and board.

17 And to make this distinction, to create this
18 preferred class of employers is, in my view, un-
19 constitutional on its face. And I think it further
20 buttresses the argument that in fact the statute
21 concerns itself with an aspect of smuggling. And not
22 with this situation.

23 THE COURT: Well, if the statute had carved
24 out other exceptions besides employers, you might
25 have a point on the smuggling question. But I cannot

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2 say that Congress had no rational basis for excluding
3 employers from this statute and under the circumstances,
4 I think -- my own feeling at the moment is that I
5 would not hold the statute unconstitutional on that
6 ground.

7 I can see a rational basis for drawing a
8 distinction between employers and other persons.

9 MR. REILLY: Would the Court state that basis?

10 THE COURT: Well, for one thing, employers
11 would not have the same facility to determine whether
12 a person was an illegal alien as an owner would.
13 I think that the -- particularly volume employers,
14 when you are talking about enormous volumes of employers,
15 several thousand, what-have-you, it -- I think perhaps
16 this was Congress' reason for carving out an exception
17 in the case of employers and putting the burden on
18 other persons, such as landlords and so forth that they
19 have placed by this statute.

20 MR. REILLY: Well, with respect to that, I
21 think in fact in the common and ordinary dealings
22 of life that we all have, in a landlord-tenant relation-
23 ship, this is not necessarily the case at all,
24 especially if it's any week-to-week tenancy which is
25 basically what we are talking about here.

I don't think there is any obligation on a

EXCERPTS FROM TRANSCRIPT

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3 landlord to take any detailed information or to delve into the background or especially nationality of an individual and in fact, I think there are statutes that preclude one from being involved in questioninf of this nature in renting or selling homes to people.

I think quite the opposite is true, when one goes for virtually any job, as evidenced by the things like job applications, the employer in fact gets a lot more information than is incumbent upon a landlord to get.

So I don't feel that that is a rational basis for this at all.

THE COURT: Well, it's apparently -- apparent rational behind the exception.

MR. CORCORAN: Mr. Reilly's argument merely goes to the knowledge on the part of the landlord. He may not take any -- he may not have any application forms and certainly if he had no knowledge he wouldn't be subject to penalty under the statute.

However, when there are circumstances as are alleged here, whereby the knowledge stares him in the face, application forms aren't required.

The statute requires that the man knowingly harbor and I believe the circumstances are such that the jury can infer knowledge on the part of Mr. Lopez.

4

Insofar as the exemption of employment indicating the entire statute taeks in smuggling, I think just the opposite is true. The scheme of the statute indicates that employers may be liable for smuggling or concealing.

THE COURT: Would have been liable exception.

MR. CORCORAN: But not for harboring.

THE COURT: Would have been liable under the harboring but for the exception. And Congress carved out that exception. That's one of the reasons why I feel so strongly about your first argument, about there must be some smuggling because I don't think it squares with this exception.

Apparently, Congress thought that without this exception, employers might be cast in the same boat as other persons and they carved it out.

MR. REILLY: If this be the law, why shouldn't they be?

THE COURT: I beg your pardon?

MR. REILLY: If this be the law, why shouldn't they be?

THE COURT: Employers? Because there is an exception.

MR. REILLY: Why rationally should they be excepted?

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THE COURT: I am not about to hold that --

at this point without some showing that I don't have that the Congress was without a rational basis for carving out this exception.

MR. REILLY: I think it particularly applies to the situation of --

THE COURT: Mr. Reilly, let me put it this way: If you can show me, either in the Congressional Record or otherwise that there is no rational basis for this exception, I will consider this question of -- quite apart -- at any stage of the proceeding.

MR. REILLY: All right.

May I have a moment? I don't know if I have anything on that.

THE COURT: That is not to say that I want to hold up this proceeding at this point because we have a jury.

MR. REILLY: Let me continue.

THE COURT: I will consider it at any stage of the proceeding. If a -- if the statute is unconstitutional, if you can show me that even after a jury verdict, it's unconstitutional, then we will set it aside.

Come on, Mr. Reilly, let's get on with the rest of the motions.

EXCERPTS FROM TRANSCRIPT

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MR. REILLY: I'd further argue, in regard⁷⁵⁵

to the same type of factual situation we've just been talking about, that this doesn't afford equal protection of law to these two --

THE COURT: I understand your constitutional argument.

MR. REILLY: Now, I'd further move to dismiss each and every one of the counts on the basis that in the statute it says, in addition to a -- excepting employers from any liability under this statute, it also says, in words --

THE COURT: "Including the usual and normal practices incident to employment."

MR. REILLY: Right. I would content, I would make the same argument that I have just made and that I would contend that since the statute of this nature should be strictly construed, that eating and sleeping and having a place to eat, sleep and live in -- when we are construing a criminal statute, is incidental and necessary to employment.

This has particular application in the situation where you can --

THE COURT: Have a Mexican wetback who comes across and who is housed by the company store, so to speak.

EXCERPTS FROM TRANSCRIPT

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MR. REILLY: Pardon me.

THE COURT: The Mexican wetback comes across and is housed by the company store.

MR. REILLY: Yes.

By the company store, by the farmer. What rational distinction can be drawn between these two things and surely with this exception under the statute, there cannot be any sensible rational distinction between these two.

THE COURT: If there was some proof in this case that Jamison Plastic or Hollywood or whatever the name of the other company was, if Mr. Lopez was an employee of one of these companies and he was out recruiting employees for them and providing housing and they were financing him, you might have an argument

We have two separate entities here and two quite different things, as I see it.

MR. REILLY: I think that a factual situation like that merely buttresses the argument that there is in fact no rational distinction and it is unconstitutional.

THE COURT: It may be something you can use in your constitutional argument but I think as far as a factual proof to sustain the charge, assuming that the constitutional -- the statute be constitutional, I think on that part of it I'd have to deny it.

EXCERPTS FROM TRANSCRIPT

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MR. REILLY: I'd further move to dismiss several counts of the indictment. I don't, in the course of the trial, I didn't take accurate notes as to them but the record will reflect that in several cases, with respect to the aliens who were produced at trial, that there was a total failure on the part of Mr. Corcoran to have them identify this Mr. Lopez.

And that that failure is a fatal defect as to each of those counts.

MR. CORCORAN: Your Honor, identity is not an issue here. Moreover --

MR. REILLY: It's all an issue.

MR. CORCORAN: In each case, the alien was asked when he met with the defendant, Mr. Lopez. I don't think there was any question about that as -- never was any question that arose in my mind, Mr. Reilly, they all, I think either identified him physically or they said they were living in houses by this Mr. Ernesto Lopez and gave the address which corresponded to the addresses in the stipulation.

They paid rent to the owner of that house. I don't think there was -- any question raised in my mind on that point.

MR. REILLY: I think it is incumbent upon

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EXCERPTS FROM TRANSCRIPT
1 them to do that and I think it is a fatal defect
2 in each of the counts where they didn't do it.

3 MR. CORCORAN: Your Honor, the government is
4 willing to reopen -- move to reopen its case and put
5 each on the stand to identify Mr. Lopez.

6 THE COURT: I don't think it -- I had no
7 recollection of any such failure but even assuming
8 there was, I think the proof was still affirmative
9 enough to identify this defendant.

10 MR. REILLY: I'd further move to dismiss on
11 the grounds that the government has failed to make
12 any reasonable attempt in its proof with respect to
13 knowledge. To exclude any of the other --

14 THE COURT: I can't say this as to Counts 20,
15 21, 22 and 3, as I see it. You can say it as to
16 the balance but I think that the knowledge -- they
17 have produced quite a volume of evidence.

18 MR. REILLY: With respect to knowledge, just
19 as an element, I'm moving to dismiss each and every
20 count. I think --

21 MR. CORCORAN: I think Mr. Reilly mad that
22 motion earlier.

23 MR. REILLY: I would like to add something to
24 my prior motion. I may have made it before and if
25 I have, I'll stop. I think the Court has to consider

EXCERPTS FROM TRANSCRIPT

1 3 very seriously the different status that these people
2 covered and there is evidence in the case.

3 MR. CORCORAN: That was raised.

4 MR. REILLY: That there was no proof of that
5 -- that Mr. Lopez was in any way aware of what the
6 particular status of any individual was or could
7 have been. And that because there are some statuses
8 that an alien can have in this country, it is incum-
9 bent upon them to exclude, at least make reasonable
10 efforts to exclude that before you submit a question
11 like this to a jury and I don't think there has been
12 any proof. I think they have a burden in that re-
13 gard.

14 THE COURT: They have a burden of proving facts
15 from which a jury can infer knowledge. I think the
16 general rule is that they don't have to exclude
17 every possible hypothesis that might be and I think
18 that proof is sufficient on the overall to show that
19 -- sufficient from which a jury could infer that he
20 had knowledge. Put it that way?

21 MR. CORCORAN: The proof is that these indi-
22 vidual aliens were in fact illegal and not -- did not
23 have any other status that would make them legal.

24 MR. REILLY: But the question is not that.
25 The question is --

EXCERPTS FROM TRANSCRIPT

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THE COURT: I think I have made my point.

I understand your point, Mr. Reilly, but I think --
I cannot agree with you on it.

MR. REILLY: I'd further move to dismiss the
case on the grounds that it is unconstitutional and that
it doesn't fairly apprise a law enforcement agent as
to what in fact is the law in this regard. In regard
to the question of what is harboring. And whether
or not it is --

THE COURT: That is your vague and unconstitu-
tional argument?

MR. REILLY: That is another portion of a
vague and unconstitutional argument, that it does not
in fact do that and I think it is evident in the
record by the fact that there apparently has never
been a prosecution of this nature before.

MR. CORCORAN: That should not be in the
record. You were arguing points of law.

THE COURT: Wait a minute. . . . You are
mixing two different things. You are not arguing
that, the selective or discrimination prosecution
question. Your argument is that the word "harbor"
is too indefinite to be probably enforced by law
enforcement agents. As far as that is concerned, I
would deny your motion.

EXCERPTS FROM TRANSCRIPT

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1 MR. REILLY: And that by its nature this statut
2 is unfairly and unconstitutionally elective in its
3 application -- in its application in this case.

4 THE COURT: Well, that is part of your other con-
5 stitutional argument that I said you could make at any
6 time. I certainly will consider it further, but I
7 will deny it at this point, without prejudice to your
8 right to renew it.

9 If the statute is unconstitutional, it's uncon-
10 stitutional regardless --

11 MR. REILLY: Pardon?

12 THE COURT: If the statute is unconstitutional,
13 it's unconstitutional regardless what the facts may be.

14 MR. REILLY: May I just have a moment or two?

15 As to Count 13, I further argue that this is --
16 there is a failure to prove that Mr. Lopez harbored an
17 Ana Lasos Velasquez at all the addresses inquestion;
18 that there was no proof offered that any rent was paid.

19 There was no proof that she lived there; that
20 the only proof submitted was that she happened to be
21 there on that night. And the purposes of that I won't
22 go into. But I think that there is a total failure of
23 proof that in fact she was harbored by Mr. Lopez at
24 that place.

25 MR. CORCORAN: Your Honor, Mrs. Velasquez testi-

EXCERPTS FROM TRANSCRIPT

1 fied --

2 THE COURT: I remember her.

3 Wait a minute. She -- Oh, your motion is denied.
4 I mean he was certainly giving shelter and entertaining
5 her within the definition of the Herrera case, as I read
6 it.

7 MR. REILLY: I think the situation was that of
8 assuming the prosecution's case, the evidence as to her
9 being in that particular place was not evidence of
10 harboring, --

11 THE COURT: Oh, yes.

12 MR. REILLY: If you invite a guest for a particular
13 purpose to a particular place --

14 THE COURT: Let me read you the definition of
15 harboring.

16 MR. REILLY: As your Honor has defined it.

17 THE COURT: In Herrera the term harboring means
18 to afford lodging, to entertain a guest, to shelter or
19 to give refuge with a specific intent.

20 MR. REILLY: That's the way that one case de-
21 scribes it.

22 THE COURT: That is the case I indicated I was
23 going to follow.

24 MR. CORCORAN: I think that is supported by the
25 United States against Mack 112 F.2d.

EXCERPTS FROM TRANSCRIPT

1 MR. REILLY: I think quite the opposite of
2 United States versus Mack.

3 THE COURT: No. I will deny your motion as to
4 that case.

5 MR. REILLY: Well, that would conclude at this
6 time my argument with respect to the motion.

7 THE COURT: Are you ready to go?

8 MR. CORCORAN: May I just have one moment.

9 THE COURT: I would like to get to the summations.

10 MR. REILLY: And if I could just have a minute,
11 too.

12 THE COURT: How long are you going to be on sum-
13 mations?

14 Wait a minute. I want an estimate from both of
15 you.

16 MR. REILLY: Your Honor, after being a lawyer I
17 have given up estimating completely.

18 THE COURT: I would like to have you -- I will
19 give you both an hour, until 1:30.

20 MR. REILLY: I don't want to be confined to a
21 specific time. This is a rather lengthy case.

22 THE COURT: Well, I want to give it to them if
23 it's possible. But if you are going to run into the
24 middle of the afternoon I won't be able to give it to
25 them until tomorrow. I will have to charge tomorrow

JUDGMENT AND SENTENCE.

It is adjudged on count one of the information that the defendant is hereby committed to the custody of the Attorney General, or his authorized representative, for imprisonment for a term of four years, and the defendant shall become eligible for parole under Title 18, USC Section 4208(a) (2) at such time as the Board of Parole may determine, and the defendant shall pay a fine to the United States in the sum of ten thousand dollars.

It is adjudged on count two that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a term of two years, and that defendant shall become eligible for parole under Title 18 United States Code, Section 4208(a) (2), at such time as the Board of Parole may determine, and the defendant shall pay a fine to the United States in the sum of five thousand dollars, and that the term of imprisonment under the second count of the information shall be served concurrently with the previous sentence under count one of the information.

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Attorney for

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